Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–9–04 OF 2012(W)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, SURIYADI AND AHMAD MAAROP FCJJ
16 JANUARY 2013

Administrative Law — Judicial review — Application for leave — Appeal against refusal of leave — Review of second respondent's decision not to allocate funds to constituency — Whether decision sought to be reviewed was based on policy consideration or management prerogative — Whether decision not amenable to judicial review — Whether issue of whether decision of first and/or second respondent amenable to judicial review could be decided at leave stage

The appellant, the Member of Parliament for Sungai Siput, made an application for the allocation of public monies from the Federal Consolidated Funds to fund certain projects for the constituency of Sungai Siput for the year 2010 (the 2010 Special Constituency Allocation). The Director of the Perak State Development Office ('the second respondent') informed the appellant that as of 25 July 2010, it had already approved a total of 56 projects valued at 1.72 million for Sungai Siput, while other applications were being given consideration. The second respondent also gave the respondent practical suggestions to channel relevant applications to relevant government agencies. Dissatisfied with this decision, the appellant applied by way of notice of motion under O 53 of the Rules of the High Court 1980 for leave to apply for judicial review of the second respondent's decision. The appellant contended that the first and/or the second respondent had exercised his/their discretion wrongly by rejecting his application for the 2010 Special Constituency Allocation. The respondent's motion sought, inter alia, an order of certiorari to quash the second respondent's decision and an order of mandamus to compel the second respondent to grant the appellant's application for the 2010 Special Constituency Allocation. The High Court judge granted the appellant's leave application but on appeal the Court of Appeal set aside the order of the High Court. The Court of Appeal was of the view that the Special Constituency Allocation involved policy consideration and management prerogative; hence it held that the appellant's complaint was legally unsustainable and therefore not judicially reviewable. This was an appeal by the appellant against the decision of the Court of Appeal.

Held, dismissing the appeal with no order as to costs:

(1) In the present case the Court of Appeal was right in deciding that our

courts did 'not possess the knowledge of policy considerations that underlie the decisions' made by the first and second respondents. The disbursement of the Special Constituency Allocation was a policy matter, which was not within the purview of the courts. Government policies emanate after consideration of a number of technical factors that are often non-legal and judges did not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness of a particular policy (see para 18).

(2) In the present case, the second respondent had clearly explained, why he decided the way he did with regard to the distribution of the Special Constituency Allocation and this decision clearly hinged on matters relating to policy which belonged to the realm of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa would bring about disrepute to our system of government, which upholds the separation of powers between the three main components vis-à-vis the executive, the legislature and the judiciary. At the same time, the court was duty bound to interfere where the policy or action of the executive was inconsistent with the Constitution or there were elements of mala fides and abuse of power. However, on the facts and circumstances of the present case the decision of the first and/or second respondent was not amenable to judicial review (see paras 20–21).

(3) The issue of whether the decision of the first and/or second respondent was amenable to judicial review could be decided at the leave stage. It was not a requirement that the court should only decide on the issue after hearing all the evidence at the substantive motion for judicial review. There was no purpose for the High Court to grant leave for the purpose of investigation on a full inter partes basis, when the supporting documents exhibited by the appellant clearly showed that the appellant had no arguable case. Hence the Court of Appeal was right to set aside the order of the High Court in granting leave to institute judicial review proceedings (see paras 22–23).

[Bahasa Malaysia summary

Perayu, Ahli Parlimen Sungai Siput, telah membuat permohonan untuk peruntukan wang awam daripada Kumpulan Wang Bersatu Persekutuan untuk membiayai projek-projek tertentu untuk kawasan pilihan raya Sungai Siput bagi tahun 2010 ('Peruntukan Khas Kawasan Pilihan Raya 2010'). Pengarah Pejabat Pembangunan Negeri Perak ('responden kedua') memberitahu perayu bahawa sehingga 25 Julai 2010, ia telah pun meluluskan sejumlah 56 projek bernilai 1.72 juta untuk Sungai Siput, manakala permohonan lain sedang dipertimbangkan. Responden kedua juga memberikan responden cadangan praktikal untuk menyalurkan permohonan-permohonan berkaitan kepada agensi-agensi kerajaan berkaitan.

Berasa tidak puas hati dengan keputusan ini, perayu telah memohon melalui notis usul di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk kebenaran memohon semakan kehakiman terhadap keputusan responden kedua. Perayu berhujah bahawa responden pertama dan/atau kedua telah menggunakan budi bicaranya/mereka dengan salah kerana menolak permohonannya untuk Peruntukan Khas Kawasan Pilihan Raya 2010. Usul yang dipohon responden, antara lain, perintah *certiorari* untuk membatalkan keputusan responden kedua dan perintah *mandamus* untuk mendesak responden kedua membenarkan permohonan perayu untuk Peruntukan Khas Kawsan Piihan Raya 2010. Hakim Mahkamah Tinggi telah memberikan permohonan kebenaran perayu tetapi semasa rayuan Mahkamah Rayuan telah mengetepikan perintah Mahkamah Tinggi. Mahkamah Rayuan berpendapat bahawa Peruntukan Khas Kawasan Pilihan Raya melibatkan pertimbangan polisi dan prerogatif pengurusan; justeru ia memutuskan bahawa aduan perayu tidak dapat dikekalkan dari segi undang-undang dan dengan itu tidak boleh dikaji semula secara kehakiman. Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Rayuan.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Dalam kes ini Mahkamah Rayuan adalah betul untuk memutuskan bahawa mahkamah 'did not possess the knowledge of policy considerations that underlie the decisions' yang dibuat oleh responden-responden pertama dan kedua. Pembayaran Peruntukan Khas Kawasan Pilihan Raya merupakan perkara polisi, yang bukan dalam skop mahkamah. Polisi-polisi kerajaan terhasil selepas pertimbangan beberapa faktor teknikal yang biasanya bukan dari segi perundangan dan para hakim tidak memiliki maklumat dan kepakaran yang perlu untuk menilai faktor-faktor yang bukan bersifat perundangan dan untuk memberi peghakiman berhubung kesesuaian suatu polisi tertentu (lihat perenggan 18).

(2) Dalam kes ini, responden kedua dengan nyata menjelaskan, kenapa dia membuat keputusan seperti yang telah dilakukannya berhubung pengagihan Peruntukan Khas Kawasan Pilihan raya dan keputusan ini jelas bergantung kepada perkara-perkara berkaitan polisi yang sepatutnya dalam skop eksekutif. Perebutan kuasa yang tidak wajar dan pelanggaran oleh badan kehakiman ke dalam skop eksekutif dan sebaliknya juga akan membawa kepada keaiban sistem kerajaan kita, yang berpegang kepada pengasingan kuasa antara tiga komponen utama iaitu melalui eksekutif, perundangan dan kehakiman. Pada masa sama, mahkamah terikat dengan kewajipan untuk campur tangan di mana polisi atau tindakan eksekutif tidak konsisten dengan Perlembagaan atau terdapat elemen-elemen berniat jahat dan penyalahgunaan kuasa. Walau bagaimanapun, berdasarkan fakta dan keadaan kes ini keputusan

responden pertama dan/atau kedua tidak sesuai untuk semakan kehakiman (lihat perenggan 20–21).

(3) Isu sama ada keputusan responden pertama dan/atau kedua adalah sesuai untuk semakan kehakiman boleh diputuskan di peringkat kebenaran itu. Tiada keperluan bahawa hanya mahkamah patut memutuskan isu itu selepas mendengar semua keterangan pada usul substantif untuk semakan kehakiman itu. Tiada tujuan untuk Mahkamah Tinggi memberikan kebenaran bagi tujuan siasatan atas dasar inter partes sepenuhnya, apabila dokumen sokongan yang diekshibitkan oleh perayu jelas menunjukkan bahawa perayu tidak mempunyai kes yang boleh dihujahkan. Justeru Mahkamah Rayuan adalah betul untuk mengetepikan perintah Mahkamah Tinggi dalam memberikan kebenaran untuk memulakan prosiding semakan kehakiman (lihat perenggan 22–23).]

Notes

For cases on application for leave, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 321–324.

Cases referred to

Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh & Ors [2012] 1 CLJ 1, SC (refd)

Council of Civil Service Unions v Minister for Civil Services [1985] AC 374, HL (refd)

Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

Laker Airways Ltd v Department of Trade [1977] 1 QB 643, QBD (refd)

Peguam Negara Malaysia v Dr Michael Jeyakumar Devaraj [2012] 1 MLJ 179, CA (folld)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

R v Criminal Injuries Compensation Board, ex parte Lain [1967] 2 All ER 770, QBD (refd)

Legislation referred to

Federal Constitution art 8(1)
Rules of the High Court 1980 O 53
Specific Relief Act 1950 Chapter VIII Part 2

Appeal from: Civil Appeal No W–01–215 of 2011 (Court of Appeal, Putrajaya)

Ambiga Sreenevasan (Mahaletchimi Balakrishnan with her) (Sreenevasan) for the appellant.
Narkunavathy Sunderason (Naatra bt Idris with her) (Senior Federal Counsel, Federal Counsel, Attorney General's Chambers) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal on 10 October 2011, which allowed the attorney general's appeal against the decision of the High Court. The High Court had on 28 February 2011 dismissed the attorney general's objection to the respondent's application for leave to file an application for judicial review under O 53 of the Rules of the High Court 1980 ('RHC').

[2] Leave to appeal was granted by this court on 8 March 2012 and the questions framed for determination of this appeal are:

> Question 1
> Whether an allegation that the decision or exercise of discretion sought to be reviewed under judicial review is based on policy consideration or management prerogative ought to be determined on an application for leave for judicial review, or whether the issue ought to be determined by the court after hearing all the evidence at the substantive motion for judicial review.

> Question 2
> Whether a decision is alleged to be based on policy consideration or management prerogative ('non-statutory discretion') is ex facie non-justiciable, or whether the justiciability of such a decision is dependent on the existence, nature and extent of the non-statutory discretion and on the particulars facts of each case.

BACKGROUND FACTS

[3] The appellant is the Member of Parliament ('MP') for the Sungai Siput

constituency in the State of Perak. Before the High Court, the appellant had applied for leave for judicial review under O 53 of the RHC, to challenge the decision of the Director-General of the Implementation Coordination Unit of the Prime Minister's Department ('the first respondent'), the Director of the Perak State Development Office ('the second respondent') and the Government of Malaysia ('the third respondent') with regards to allocation of public monies known as the Special Constituency Allocation from the Federal Consolidated Funds in particular to Sungai Siput constituency.

[4] The facts leading to the application are these. On 9 July 2010, the appellant wrote to the second respondent applying for funds from the Special Allocation for the year 2010 for various projects and activities and purchases of equipments for schools, association and communities in Sungai Siput constituency. The appellant stated in his letter that the projects and activities applied for, fall within the situations for which funding will be and has been approved according to the first respondent's website, the written response by the Prime Minister's Department in Parliament and the second respondent's letter dated 19 October 2009.

[5] The funds applied for in the 2010 application were as follows:

(a)	For victims of natural disasters (to be kept in the	RM50,000
(b)	SMJK Shin Chung	RM25,000
(c)	SJK Methodist	RM25,000
(d)	Nurul Ihsan Orpanage	RM50,000
(e)	SJK(T) Mahatma Ghandi Kalaalai	RM25,000
(f)	SJK(T) Ladang Dovenby	RM25,000
(g)	SRJK(C)Shing Chung	RM25,000
(h)	Sg Buloh Old Folks' Home	RM25,000
(i)	Sg Siput-Kuala Kangsar Association for the disabled	RM5,000
(j)	Small projects for traditional villages	RM160,000
(k)	Meetings with youth in recreational parks and villages	RM5,000
(l)	Anbu Nilayam Child Care Center (for single mothers)	RM30,000
(m)	Small projects for Orang Asli	RM200,000

[6] The second respondent by a letter dated 26 July 2010 informed the appellant that:

(a) as of 25 July 2010, 56 projects valued at RM1.72m had been approved

for Sungai Siput, nine of which valued at RM1.15m were being implemented, while 47 projects valued at RM561,865.15 had been completed;

(b) the appellant's application for RM50,000 for victims of natural disasters to be deposited in the land office, cannot be considered because there was no allocation for that purpose. It was suggested that the appellant submits the list of victims concerned together with police report for consideration, so that there would be no overlapping with contributions from other government agencies; and

(c) as to the appellant's proposal for funding the relevant Parent-Teachers Association ('PTA') and other bodies, the appellant was requested to submit a list of names of the PTA's and particulars of account details for the second respondent's consideration.

[7] By a letter dated 24 August 2010, the appellant provided the details requested by the second respondent (in para 5.3) and sought the second respondent's clarification about the approved projects.

[8] The second respondent by a letter dated 12 October 2010 (written response) informed the appellant that:

(a) the funds for the victims of natural disasters were rejected earlier by PPN Perak's letter dated 26 July 2010;

(b) the contribution includes grants to organisation and societies such as the SMJK Shing Chung (National Type Secondary School) PTA Methodist School PTA and Nurul Ihsan Orphanage could not be considered as the funds were already approved in 2010 which included contributions to organisations and associations such as the Parent Teachers Associations of SMJK Shinn Chung and SJK Methodist and Nurul Ihsan Orphanage. As the allocation was limited, parties that had received such contributions would not be considered;

(c) as for allocations sought for various schools and organisations which would include SJK(T) Mahtma Gandhi Kalasalai, SJK(T) Ladang Dovenby, SRJK(C) Shing Ching, Sg Buluh Old Folks' Home, Sg Siput-Kuala Kangsar Association for the disabled, small projects for traditional villages, meetings with youth in recreational parks and villages, and Anbu Nilayam Child Care Center (for single mothers). The appellant was duly informed that the necessity of these proposed contributions would be assessed; and

(d) for minor projects in the Orang Asli villages, the appellant was advised to submit the application to the Department of Orang Asli Affairs.

[9] Aggrieved by the written response, the appellant on 29 October 2010 filed an application for leave to institute judicial review proceedings against the respondents seeking the following orders that: **A**

(a) a writ of 'quo warranto' be issued against the respondents and each of them to show cause and give information as to their authority to exercise, vest and/or delegate the discretion to approve and disburse funds from the Federal Consolidated Funds which are allocated in the Federal Budget 2010 and any annual Federal Budget to the Prime Minister's Department (as 'Peruntukan Khas' or 'Peruntukan Khas Perdana Menteri untuk Kawasan Parlimen') for all parliamentary constituencies ('Special Constituency Allocation'), and to explain their respective roles and relationship in relation to one another; **B** **C**

(b) an order of mandamus to compel the respondents and each of them to specify: **D**

(i) the kind of projects and activities for which application for funds from the Special Constituency Allocation will be granted;

(ii) who can apply for funds from the Special Constituency Allocation;

(iii) all conditions and criteria taken into consideration by the respondents in granting funding applications for the Special Constituency Allocation; and **E**

(iv) the time limit within which decisions on applications for the Special Constituency Allocation will be made.

(c) a declaration that, in accordance with art 8(1) of the Federal Constitution, the Special Constituency Allocation must be provided and made available to all Members of Parliament equally, that the power and discretion vested in the respondents or any of them to approve applications for funds from the Special Constituency Allocation must be exercised equally and equitably amongst all Members of Parliament and all categories of applicants, regardless of political affiliations, and that the same criteria or conditions must be applied in considering all such applications; **F** **G**

(d) a declaration that the decision of the second respondent set out in the second respondent's letter dated 12 October 2010 or any part thereof is a breach of art 8(1) of the Federal Constitution and as a result, unconstitutional and void; **H**

(e) an order of certiorari to quash the decision of the second respondent as set out in the second respondent's letter dated 12 October 2010 or any part thereof, and consequently: **I**

(i) an order of mandamus to compel the respondents or any of them to grant the applicant's application vide his letter dated 9 July 2010 to

A the second respondent for funds from the Special Constituency Allocation for the Sungai Siput Parliamentary Constituency (P 62) for the year 2010, or

(ii) in the alternative, an order of mandamus to compel the respondents to exercise their discretion to grant applicant's application vide his letter dated 9 July 2010 to the second respondent for funds from the Special Constituency Allocation for the Sungai Siput Parliamentary Constituency (P 62) for the year 2010 in accordance with the guidelines and practice specified pursuant to prayer 2 above and art 8(1) of the Federal Constitution pursuant to prayer 3 above;

(f) an order of mandamus to compel the respondents to specify:

(i) all projects and activities for which application for funds from the Special Constituency Allocation has been granted since 2008 for the Sungai Siput Parliamentary Constituency (P 62);

(ii) the number of applications received, the persons or parties whose applications were approved and rejected and the persons or parties to whom the funds were disbursed for the applications that were approved vis a vis the Special Constituency Allocation since 2008 for the Sungai Siput Parliamentary Constituency (P 62); and

(iii) the time limits within which the applications for funds from the Special Constituency Allocation since 2008 for the Sungai Siput Parliamentary Constituency (P 62), were decided;

(g) damages and/or punitive, aggravated and/or exemplary damages to be paid to the appellant by the respondents;

(h) an inquiry and/or at the appellant's option an assessment of damages and/or punitive, aggravated and/or exemplary damages to be paid to the appellant by the respondents;

(i) costs; and

(j) all necessary and consequential relief, orders and/or directions.

[10] The attorney general had objected to the leave application on the following grounds:

(a) in respect of the prayer for a writ of quo warrants —

(i) the relief was not suitable as the appellant was not challenging the appointment or qualification of either the first respondent or the second respondent;

(ii) there were no facts or grounds in the appellant's application to sustain an application for that relief; and

(iii) the appellant was using that prerogative writ to elicit information from the first respondent and the second respondent that he had already sought and obtained as a Member of Parliament for Sungai Siput;

(b) in respect of the prayer for an order of mandamus —

(i) the application did not comply with the provisions of Chapter VIII Part 2 of the Specific Relief Act 1950; and

(ii) such an application was tantamount to compelling the second respondent to approve the appellant's application and therefore contrary to established principles of law;

(c) in respect of the prayer for a declaration, that such an application was an abuse of the process of the court;

(d) that the appellant's application involved policy consideration and the management prerogative of the first respondent and the second respondent regarding the disbursement of the Special Constituency Allocation; and

(e) that the court was not a suitable forum to arbitrate on a decision regarding the disbursement of the Special Constituency Allocation.

[11] On 28 February 2011, the learned High Court judge, dismissed the objection by the attorney general and allowed the appellant's application for leave to institute judicial review proceedings. The learned High Court judge was of the view that a mere assertion that a matter was a management prerogative and therefore not reviewable by the court was insufficient to reject the appellant's application. Her Ladyship found that there were issues that go to the merits of the application which ought to be resolved at the hearing of the substantive motion.

[12] Aggrieved with the decision of the High Court, the attorney general appealed to the Court of Appeal. On 10 October 2011, the Court of Appeal unanimously allowed the appeal and set aside the order of the High Court. The Court of Appeal was of the view that:

(a) the appellant as a Member of Parliament had already sought and obtained in Parliament the relevant informations regarding the allocations sought and since the appellant was not challenging the qualification and appointment of the first respondent and the second respondent or any legal flaw in their qualifications and appointments, the relief sought was outside the scope of a writ of quo warranto;

(b) on the facts as set out by the appellant as found in the affidavit in support, there was a proper exercise of discretion by the first respondent and/or the

second respondent in rejecting the application sought by the appellant which was in line with policy consideration and management prerogative; and

(c) the disbursement of the Special Constituency Allocations involved policy consideration and management prerogative; hence, the appellant's complaint was legally unsustainable and therefore not judicially reviewable.

ISSUES AND FINDINGS

[13] Based on the two questions of law posed to us, learned counsel for the appellant, Dato' Ambiga Sreenevasan submitted that though the decisions of the first respondent and/or second respondent were alleged to be based on policy consideration or management prerogative, they were reviewable; and hence, justiciable. In support thereof, she referred to the cases of *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33, *Council of Civil Service Unions v Minister for Civil Services* [1985] AC 374, *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 All ER 770, *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 and the recent Indian Supreme Court case of *Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh & Ors* [2012] 1 CLJ 1. She argued that at the very least the issue ought to be determined by the court after hearing all the evidence at the substantive motion for judicial review. She pointed out that the Court of Appeal's decision was made in the absence of any evidentiary support and was contrary to the prevailing law on the legal burden imposed on parties in a judicial review proceeding, as the said decision allowed the respondents to 'escape' judicial review on a mere unsubstantiated allegation of 'non justiciable prerogative', without needing to satisfy the legal burden on them to prove the same.

[14] Learned senior federal counsel, Puan Narkunavathy maintained the attorney general's position from the beginning that the reliefs sought by the appellant were non-reviewable and non-justiciable because they involved policy considerations which was the management prerogative of the first respondent and/or the second respondent, where decisions involved were an exercise of discretion. In support thereof, she referred to the following cases of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; *Council of Civil Service Unions v Minister of Civil Service* and *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11. She further submitted that the supporting documents exhibited by the appellant are sufficient evidence for the court to decide on the issues without needing the respondents to adduce further evidence.

[15] It was clear from the appellant's notice of motion that the issues before us relate to the decisions of the respondents with regard to the disbursement of the Special Constituency Allocation. The appellant contended that his application for 2010 Special Constituency Allocation for various projects, activities and purchase of equipment of school, association and communities in Sungai Siput were rejected by the second respondent and in doing so the first respondent and/or the second respondent had exercised his/their discretion wrongly. The question is, whether such exercise of discretion is amenable to judicial review.

[16] We have no hesitation in accepting that the executive's discretion, whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case (see *R Rama Chandran*, *Kumpulan Perangsang Bhd* and *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625. It was generally held in those cases that not every decision of the executive could be subjected to judicial review.

[17] In the instant case, the Court of Appeal in dealing with the issue held that:

> In our view, and as implied in the notice of motion, there can be no doubt that the approval and disbursement of the fund involves an exercise of discretion. The DG and/or the director must evaluate the applications for the allocations. These applications can only be decided by the DG and/or the director in line with policy considerations and management prerogatives. The factual background did show that the appellants had approved the respondent's application amounting to RM1.72m, while other applications are being given consideration. The director has given practical suggestions to the respondent to channel relevant applications to relevant government agencies. In the process of evaluation, the DG and/or the director must comprehensively balance and safeguard the disbursement of the allocation, consistent with government policy and guidelines. Our courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the director's evaluation.

[18] We are in complete agreement with the above view. We would like to add that the disbursement of the Special Constituency Allocation is a policy matter which is not within the purview of the courts. It is our view that the courts is in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the executive. We have to take cognisance of the fact that government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy of a particular policy.

[19] In this regard, we would quote the relevant passages of the renown authors, MP Jain and SN Jain from their book entitled *Principles of Administrative Law* (6th Ed), at p 1069:

> It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitution, statutory or any provision of law. When the government forms its policy it is based on a number of circumstance on facts, law, including constraints based on these resources. It is also based on its expert opinion, it would be dangerous if court is asked to test the utility, beneficiat effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive (see *State of Punjab v Ram Lubhaya Bagga*, AIR 1998 SC 1703). On matters affecting policy and requiring technical expertise, the court would leave the matter for decision of those who are qualified to address this issue. Unless the policy or action is inconsistent with the constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters (see *Federation of Railway Officers Assn v UOI,* AIR 2003 SC 1344).

[20] In the present case, the second respondent had clearly explained, why he decided the way he did with regard to the distribution of the Special Constituency Allocation for the Sungai Siput constituency. Clearly, what was decided by the second respondent hinged on matters relating to policy and thus we would dissuade ourselves from entering into the realm which belongs to the executive. Courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa will bring about disrepute to our system of government which upholds the separation of powers between the three main components vis a vis the executive, the legislature and the judiciary.

[21] Of course, in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power, the court is duty bound to interfere. Whether or not the court should interfere clearly depends on the facts and circumstances of each case. On the facts and circumstance of this case we are inclined to agree with the Court of Appeal that the decision of the first respondent and/or the second respondent is not amenable to judicial review.

[22] We are also in agreement with the Court of Appeal that, the issue of whether the decision of the first respondent and/or the second respondent is amenable to judicial review could be decided at the leave stage. Like the Court

of Appeal we are not persuaded with the appellant's contention that the issue should only be decided at the substantive stage. Our view is that no further evidence is necessary in this case, as rightly pointed by the learned senior federal counsel, the supporting documents exhibited by the appellant which include information from the Prime Minister's Department's webpage of the first respondent's activities and the questions and answers regarding the Special Constituency Allocation in Parliament are sufficient material for the court to decide on the issue.

[23] With respect, we see no purpose for the High Court to grant leave just for the purpose of investigation on a full inter parties basis, when the supporting documents exhibited by the appellant clearly show that the appellant has no arguable case. Hence, the Court of Appeal was right to set aside the order of the High Court in granting leave to institute judicial review proceedings. We are of the same view with the Court of Appeal that leave to institute judicial review proceedings ought not to have been granted by the High Court in this case.

[24] Thus, our answers to the two questions posed to us are very much dependent on the facts of each case. On the first question, we are of the view that the decision or exercise of discretion sought to be reviewed under judicial review based on policy consideration or management prerogative may be determined at the leave stage itself. It is not a requirement that the court must only decide on the issue after hearing all the evidence at the substantive motion for judicial review.

[25] As to the second question, the justiciability of such decision is dependent on the particular facts of the case. On the facts of this case, we agree with the Court of Appeal that the issues raised in the notice of motion for leave were not judicially reviewable and hence not justifiable.

[26] For the foregoing reasons the appeal is dismissed. As agreed by parties we make no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan